In the Supreme Court of the United States

October Term, 1945

No. 128

EL DORADO OIL COMPANY and EL DORADO TERMINAL COMPANY, *Appellants*,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, GENERAL AMERICAN TRANSPORTATION CORPORATION, et al., *Appellees*.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS

Brief for General American Transportation Corporation, Appellee

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vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, GENERAL AMERICAN TRANSPORTATION CORPORATION, et al., *Appellees.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA

Brief for General American Transportation Corporation, Appellee

INTRODUCTORY

This brief is presented in behalf of appellee, General American Transportation Corporation (intervening defendant in the United States District Court), successor in interest to General American Tank Car Corporation, defendant in the suit in the United States District Court out of which the instant cause has arisen. For convenience, each of these two corporations will be hereinafter referred to without distinction as the "Car Corporation." Similarly, the appellants herein, El Dorado Oil Works and El Dorado Terminal Company, will be referred to without distinction as the "El Dorado Company."

The United States District Court, specially constituted of three judges under the Urgent Deficiencies Act (38 Stat. 219; 28 U.S.C., Secs. 41(28) and 43-48, inclusive) concluded that that court was without jurisdiction of this suit and for that reason the suit should be dismissed (R. 33-40). The Court said: "We do not pass upon the merits of the cause * * *" (R. 35). By the final decree the relief prayed for was denied and the complaint was dismissed "for want of jurisdiction" (R. 40-41).

It would seem, accordingly, that the only issue cognizable upon this appeal is that of jurisdiction. However, the brief for appellants goes beyond the issue of jurisdiction and enters upon the merits, presumptively as background for the jurisdictional point.

Since the briefs to be filed on the part of the United States and the Interstate Commerce Commission will doubtless deal fully with the issue of jurisdiction; we shall refrain from discussing that issue in the brief for this appellee. We shall address ourselves to appellants' contentions on the merits, although we understand that upon this appeal the Court is concerned, primarily at least, with the ruling of the court below that it was without jurisdiction of the suit.

OPINIONS BELOW

The opinion of the specially constituted District Court (R. 33) is reported in 59 F. Supp. 738.

The report of the Interstate Commerce Commission is reported in 258 I.C.C. 371.

JURISDICTION

The decree of the District Court was entered April 9, 1945 (R. 40). The petition for appeal filed June 1, 1945, was allowed the same day (R. 41). Probable jurisdiction was noted October 15, 1945. The jurisdiction of this Court rests on the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 219, 220 (U.S.C., Title 28, Sec. 47), and Section 238 of the Judicial Code as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, 938 (U.S.C., Title 28, Sec. 345).

STATUTES INVOLVED

The pertinent provisions of the statutes involved are set forth in the Appendix.

STATEMENT OF THE CASE

This cause had its origin in a suit at law brought by the El Dorado Company, lessee of certain railroad tank cars from the Car Corporation, the owner and lessor of such cars, to recover from the Car Corporation certain moneys, hereinafter styled "car mileage," received by the Car Corporation from the rail carriers as compensation for the use of the cars in the transportation of property of the El Dorado Company in interstate commerce. The moneys sought to be recovered by the El Dorado Company constitute the excess of the car mileage, so received by the Car Corporation from the rail carriers, above the amount of the car rental payable by the El Dorado Company for the leased cars. Under the terms of a so-called

lease agreement (September 28, 1933) (R. 52) the Car Corporation agreed, for a term of three years commencing on January 1, 1934, to furnish tank cars to the El Dorado Company for the shipment of the latter's products at a specified monthly rental for each car. It was provided that fifty cars, styled "Permanent Cars," should be so furnished at a rental of $27.50 per car per month, and that such additional cars as the El Dorado Company might require would be furnished at a rental of $30 per car per month. It was further provided that the Car Corporation would collect from the rail carriers over whose lines of railway such cars would pass the car mileage payments made by the rail carriers as compensation for the use of such cars in railroad service and would credit the payments so collected to the car rental or service account of the El Dorado Company. The car mileage payments so made by the rail carriers substantially exceeded the El Dorado Company's car rental. During the three-year period covered by the agreement the car mileage earnings exceeded the car rental by $33.04 per car per month on the average (R. 234, 235).

For approximately six months the Car Corporation credited the El Dorado Company with the full amount of the car mileage and paid over to the El Dorado Company the excess of the car mileage over the car rental. On July 2, 1934, the Interstate Commerce Commission issued its report in a case entitled *"Use of Privately Owned Refrigerator Cars,"* 201 I.C.C. 323 (1934), in which it was held that the payment to shippers of car mileage earnings, "either direct or through car owners," in excess of the amount of the rental paid for the use of the cars and other

actual expenses in connection therewith, is in violation of the Elkins Act. The findings of the Commission were confined to practices in connection with the use of privately owned refrigerator cars, since the investigation itself was thus limited. But the Commission pointedly observed:

> "The discussion herein has been confined almost entirely to refrigerator cars and the findings will be so restricted, but the general principles enunciated apply equally to all other types of private cars" (R. 248).

Pursuant to this decision condemning practices of this character as violative of the Elkins Act, the Car Corporation, which theretofore had faithfully made the agreed payments, refused further to credit or pay over to the El Dorado Company the car mileage earnings in excess of the car rental. This change in practice on the part of the Car Corporation was based on its conclusion, upon advice of counsel following the decision of the Commission referred to above, that such payments would be in violation of the Elkins Act (R. 193). Accordingly, commencing after the month of June, 1934, the Car Corporation credited the car mileage to the El Dorado Company in amounts equal to the car rental or service charges but made no payment of the excess.

By its suit at law the El Dorado Company sought to recover the balance of the car mileage payments which had been received by the Car Corporation during the period extending from January 1, 1934 to May 31, 1935. This balance, i.e., the unpaid excess above the car rental, amounted to $18,532.78 (R. 239). In defense the Car Corporation pleaded that it was prohibited by the Elkins Act from paying over such excess car mileage revenue to the

El Dorado Company in that, by such payment, the El Dorado Company would secure the transportation of property at rates less than the tariff rates, thereby obtaining a rebate or concession and an advantage or a discrimination. The text of this plea in defense has been set forth in the answer of the Car Corporation to the complaint in the District Court in the instant case (R. 24).

The United States District Court for the Northern District of California sustained the Car Corporation's plea in defense and gave judgment accordingly for the Car Corporation. Upon appeal, the United States Circuit Court of Appeals for the Ninth Circuit reversed the judgment of the District Court (*El Dorado Terminal Company v. General American Tank Car Corporation*, 104 Fed.(2d) 903). Upon the petition of the Car Corporation the Supreme Court of the United States granted a writ of certiorari. On January 2, 1940, the Supreme Court reversed the judgment of the Circuit Court of Appeals and remanded the cause to the District Court, directing that the cause be held pending the conclusion of an appropriate administrative proceeding before the Interstate Commerce Commission. (*General American Tank Car Corporation v. El Dorado Terminal Company*, 308 U.S. 422 (1940).)

On June 7, 1940, the El Dorado Company filed a petition with the Commission (R. 43-57) praying "that the Commission cause an investigation to be made of the practices disclosed by the said action, and in the said opinion of the United States Supreme Court," and that after such investigation "the Commission enter its order holding that payment by the General American Tank Car Corporation to petitioners of the amounts so collected by said

tank car corporation as mileage allowances for the use of the tank cars leased by petitioners and furnished by them to the railroad carriers may be made as provided in and for the entire period covered by the agreement of the parties dated September 28, 1933, without the violation of any provisions of the Elkins Act, and that the payments so made are reasonable and will not accomplish a rebate, concession or an advantage or discrimination in favor of either of the petitioners or in violation of the provisions of the Elkins Act * * *." (R. 51).

Pursuant to the petition of the El Dorado Company the Interstate Commerce Commission on July 24, 1940, made its order instituting an investigation (R. 57, 58). All common carriers by railroad participating in Trans-Continental Freight Bureau Tariff No. 3-N, I.C.C. No. 1452, were made respondents. The matter was heard before an Examiner of the Commission on December 9 and 10, 1940. Evidence was presented on the part of the El Dorado Company and, in turn, on the part of the respondent rail carriers, and likewise on the part of the Car Corporation, which intervened in the proceeding (R. 61-236). The Commission's report was issued under date of April 10, 1944 (R. 237-260). A petition on the part of the El Dorado Company for rehearing was denied (R. 261).

The El Dorado Company brought the instant suit, in the specially constituted District Court of three judges, praying for a decree declaring that the Commission's order is null and void and that it be set aside. From the final decree of that court, dismissing the action for want of jurisdiction, the El Dorado Company has prosecuted this appeal.

SUMMARY OF ARGUMENT

1. The Interstate Commerce Commission properly heard and determined the administrative question defined in the opinion of this Court in *General American Tank Car Corporation v. El Dorado Terminal Company, et al.*, 308 U.S. 422 (1940).

(a) This Court defined the administrative question, held to be within the competence of the Commission, as "the question of the reasonableness and legality of the practices of the parties" under the terms and operation of the lease contract.

(b) By its petition to the Commission the El Dorado Company prayed that an investigation be made of "the practices disclosed by the said action" and that the Commission enter an order holding that the car mileage in full might be paid by the Car Corporation to the El Dorado Company without violation of law.

(c) The Commission's order of investigation, entered in response to the petition of the El Dorado Company, called for an investigation to determine whether the practices involved under the terms and operation of the lease contract were unlawful in violation of the Interstate Commerce Act (R. 57, 58).

(d) After full hearing the Commission found and concluded that a just and reasonable allowance as a maximum to have been paid to the El Dorado Company for the cars in which its shipments moved would have been an amount not exceeding the rental payable by it under the terms of the lease contract and that an allowance in excess of such rental would be unjust and unreasonable and would unduly prefer the El Dorado Company as a shipper of its commodities.

2. The Commission's determination "that an allowance to the Oil Works by the respondents, rail carrier or carriers, or by the Tank Car Corporation, under the agreement, in excess of said rental would be unjust and unreasonable, and would unduly prefer the Oil Works as a shipper of its commodities transported by it in the tank cars here involved," is fully supported by evidence.

3. An administrative order of the Commission is subject to judicial review to the extent only of determining whether the order is within the scope of the Commission's authority and the basic prerequisites of proof have been satisfied

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ARGUMENT

I.

THE INTERSTATE COMMERCE COMMISSION PROPERLY HEARD AND DETERMINED THE ADMINISTRATIVE QUESTION DEFINED IN THE OPINION OF THIS COURT IN GENERAL AMERICAN TANK CAR CORPORATION V. EL DORADO TERMINAL COMPANY, ET AL., 308 U.S. 422 (1940).

It is important at the threshold to determine the nature of the issue which arose in the initial suit, as it has been formulated and characterized by this Court. In turn, consideration will be given to the issues raised in the petition of the El Dorado Company to the Commission, to the issues formulated in the Commission's order of investigation, and, finally, to the determination of those issues in the Commission's report.

(a) This Court defined the administrative question, held to be within the competence of the Commission, as "the question of the reasonableness and legality of the practices of the parties" under the terms and operation of the lease contract.

In the early part of its opinion in *General American Tank Car Corporation v. El Dorado Terminal Company, et al.*, 308 U.S. 422 (1940), this Court considered matters of general principle. That discussion, however, is wholly preliminary in character. When the Court addressed itself directly to the issue which had arisen in the litigation by reason of the affirmative defense pleaded by the Car Corporation, it expressed itself as follows (p. 428):

> "We hold that the District Court had jurisdiction but that, upon disclosure of the terms and operation of the lease contract, it should not have proceeded to adjudicate the rights and liabilities of the parties in the absence of a decision by the Commission with respect to the validity of the practice involved in the light of the provisions of the Interstate Commerce Act."

The Court said further (pp. 431-432):

> "• • • If it should appear that, with respect to the tank cars in question, the shipper-lessee is making substantial profits on leased cars, by reason of the excess of the mileage allowances over the rentals paid, it might in the light of all the facts be found that the shipper is, in the result, obtaining transportation at a lower cost than others who use cars assigned them by the carriers or own their own cars. The Commission has found that, in the case of refrigerator cars, held under similar leases, this has been the case.[12] The inquiry into the lawfulness of the practice

[12] Re Use of Privately Owned Refrigerator Cars, 201 Inters. Com. Rep. 323.

is one peculiarly within the competence of the Commission.

As the tariffs now contain no provision for the payment of car mileage allowances by the railroad to the shipper directly, and as, upon the face of things as disclosed by this record, the shipper is apparently reaping a substantial profit from the use of the cars, a clear case is made for the exercise of the administrative judgment of the Commission. The Circuit Court of Appeals, without supporting evidence in the record as to any specific items, said that there are obviously other expenses which the shipper must bear over and above the actual rental paid. If this were so, the reflection of those expenses, as well as the rental itself, in the allowance paid by the carrier to the shipper for the use of the latter's cars, would be a matter for the administrative judgment of the Commission and not for determination by a court."

The Court said again (p. 432) that

"the question of the reasonableness and legality of the practices of the parties was subjected by the Interstate Commerce Act to the administrative authority of the Interstate Commerce Commission."

This is the language in which the Court has identified the administrative problem, has assimilated it to the problem which arose "in the case of refrigerator cars," and has plainly implied that a factual parallel would call for parallel conclusions. This is the specific issue which, as this Court said, called clearly "for the exercise of the administrative judgment of the Commission." It will be noted that the Court refers to "*the validity of the practice involved in the light of the provisions of the Interstate Commerce*

Act," namely, the practice under "*the terms and operation of the lease contract.*" The Court declares that "*The inquiry into the lawfulness of the practice is one peculiarly within the competence of the Commission.*"*

This Court did not say that the Commission should make an order prescribing allowances for the future. It approved the Commission's action in the *Private Refrigerator Car case*, supra, and there the Commission made no order but simply condemned the payment to shipper-lessees of allowances in excess of their actual costs as reflected by their rental payments.

This Court addressed itself to a particular issue which had arisen in the litigation by reason of the Car Corporation's plea in defense, viz., whether car mileage in excess of car rental could be paid over by the Car Corporation to the El Dorado Company without violating the Elkins Act. This was held to be an administrative question reserved for the Commission's determination. There could have been no administrative question so reserved if this Court had intended to rule that the El Dorado Company is entitled to receive the excess car mileage. Nor would this Court have referred to the findings and conclusions of the Commission "in the case of refrigerator cars, held under similar leases" without implying that parallel facts would call for a parallel conclusion. The Court observed that, "upon the face of things as disclosed

*It is stated in appellants' brief (p. 13) that this Court in the course of its opinion "upheld the validity of the car leasing agreement." This is inexact. The Court upheld the propriety of car leasing agreements in general but did not undertake to determine the validity of practices under the instant agreement (p. 429). That question was specifically reserved for determination by the Commission.

by this record, the shipper is apparently reaping a substantial profit from the use of the cars," and, for that reason, "a clear case is made for the exercise of the administrative judgment of the Commission." This language is wholly incompatible with the El Dorado Company's contention that it is of right entitled to reap this "substantial profit."

The question was left to the Commission, for its administrative determination. The District Court was required to stay its hand pending the result of an appropriate proceeding before the Commission (p. 433).

(b) By its petition to the Commission the El Dorado Company prayed that an investigation be made of "the practices disclosed by the said action" and that the Commission enter an order holding that the car mileage in full might be paid by the Car Corporation to the El Dorado Company without violation of law.

The prayer of the petition filed by the El Dorado Company with the Commission prays that "the Commission cause an investigation to be made of the practices disclosed by the said action" and further prays that "the Commission enter its order holding that payment by the General American Tank Car Corporation to petitioners of the amount so collected by said Tank Car Corporation as mileage allowances for the use of the tank cars leased by petitioners and furnished by them to the railroad carriers may be made as provided in and for the entire period covered by the agreement of the parties dated September 28, 1933, without the violation of any provisions of the Elkins Act, and that the payments so made are reasonable and will not accomplish a rebate, concession or an advantage

or discrimination * * * in violation of the provisions of the Elkins Act" (R. 43, 51).

Nowhere in the petition is there a request that the Commission make an investigation looking to the prescription of a car mileage rate for general application, or a prayer for an order that car mileage at that rate be paid over to the El Dorado Company. On the contrary, the petition is confined specifically to "*practices disclosed by the said action,*" and its objective is an order requiring that the mileage allowances in full may be paid over to the El Dorado Company, notwithstanding that they substantially exceeded the car rental payable by the El Dorado Company for the use of the cars. In brief, the petition of the El Dorado Company raises nothing more than the administrative question formulated in the opinion of this Court.

(c) The Commission's order of investigation, entered in response to the petition of the El Dorado Company, called for an investigation to determine whether the practices involved under the terms and operation of the lease contract were unlawful in violation of the Interstate Commerce Act (R. 57, 58).

The Commission's order of investigation dated July 24, 1940 (R. 58) is fully responsive to the petition of the El Dorado Company. An investigation was instituted

> "(1) to determine whether the practices involved under the terms and operation of the lease contract are unlawful in violation of the Interstate Commerce Act; (2) to determine whether a reasonable charge or allowance may be paid, and, if so, the amount thereof as a maximum to be paid, by the carrier or carriers by railroad for the use of the tank cars furnished such carriers by petitioners for the transportation of the products of petitioners in interstate commerce

from Berkeley and Oakland, Calif., in the period January 1, 1934, to December 31, 1936; and (3) to determine what findings shall be made, or what rules, regulations or practices shall be prescribed, or what orders shall be entered, to remove any unlawfulness that may be found to exist."

It will suffice to note that the order of investigation is not only responsive to the petition of the El Dorado Company but that it conforms with the opinion of this Court defining and characterizing the administrative question. That question was directed to the validity of the "*practices*" under the terms and operation of the lease contract. The El Dorado Company did not question the propriety or sufficiency of the Commission's order of investigation. Indeed, it could not well question the scope of the order since it was fully commensurate with the petition seeking the investigation.

(d) After full hearing the Commission found and concluded that a just and reasonable allowance as a maximum to have been paid to the El Dorado Company for the cars in which its shipments moved would have been an amount not exceeding the rental payable by it under the terms of the lease contract and that an allowance in excess of such rental would be unjust and unreasonable and would unduly prefer the El Dorado Company as a shipper of its commodities.

In due course the Commission held its hearing, in which the El Dorado Company was permitted to introduce all of its proffered evidence. There was no curtailment or restriction in any respect. Evidence was presented on the part of the respondent rail carriers and likewise on the part of the intervening Car Corporation. No evidence was

offered looking to the establishment of a car mileage allowance for general application. There was no suggestion that evidence of that character should be adduced. The El Dorado Company registered no objection to the adequacy or fairness of the hearing.

All of the foregoing is plain upon the record (R. 43-236).

In due course the Commission's report was issued, in which it found and concluded as follows (R. 249-250):

> "(1) That the rental paid or to be paid by El Dorado Oil Works to General American Tank Car Corporation under the terms of the lease agreement between those parties, dated September 28, 1933, was the only cost incurred by the former in furnishing the tank cars in which its shipments moved. A just and reasonable allowance as a maximum to have been paid by the respondents, rail carrier or carriers, to the Oil Works for the furnishing of such cars would have been an amount not to exceed such rental: Such an amount and allowance has been paid to the Oil Works through credits made to the account of the Oil Works by the Tank Car Corporation.
>
> (2) That an allowance to the Oil Works by the respondents, rail carrier or carriers, or by the Tank Car Corporation, under the agreement, in excess of said rental would be unjust and unreasonable, and would unduly prefer the Oil Works as a shipper of its commodities transported by it in the tank cars herein involved. The amount paid by the Tank Car Corporation to the Oil Works prior to July 1, 1934, under the terms of the agreement, to the extent it was in excess of the rentals due thereunder, was unjust and unreasonable, and unduly preferred the Oil Works as a shipper of its commodities.

(3) That the Oil Works is entitled to no allowance from the respondents, rail carrier or carriers, directly or through the Tank Car Corporation, for the special cleaning and preparation of the tank cars during the period of the agreement, January 1, 1934, to December 31, 1936."

The proceeding was thereupon discontinued (R. 260-261).

The findings and conclusions of the Commission have full record support.

It is plain from this narrative that the Commission addressed itself to the administrative question formulated in the opinion of this Court and to that question as raised in the El Dorado Company's petition for investigation, and that a proper and adequate hearing was held. Most belatedly, the El Dorado Company argues that the Commission was required to determine a just and reasonable mileage allowance for uniform application, and that it failed to do so (Appellants' Brief, p. 14). In reply it will suffice again to point out that the prescription of a uniform mileage allowance was not within the terms of the administrative question formulated by the Court and specifically entrusted to the Commission and that no request that a mileage rate be determined and prescribed was made by the El Dorado Company either in its petition for investigation or in the course of the hearing before the Commission. Even if the Commission had undertaken to make the determination which the El Dorado Company now claims should have been made, it would still have been necessary for the Commission to deal with the administrative question which has been answered by its report and order. The Commission's report and order ac-

complishes a complete determination of all that was required by the opinion of this Court defining the administrative question, and of all that the El Dorado Company presented in its petition.

There has been no "unconstitutional assumption of authority on the part of the Commission," as the El Dorado Company mistakenly contends (Appellants' Brief, pp. 14, 15). The Commission has done no more than effect the determination which this Court entrusted to it and made a condition prerequisite to further proceedings before the District Court in the pending assumpsit action.

II.

THE COMMISSION'S DETERMINATION "THAT AN ALLOWANCE TO THE OIL WORKS BY THE RESPONDENTS, RAIL CARRIER OR CARRIERS, OR BY THE TANK CAR CORPORATION, UNDER THE AGREEMENT, IN EXCESS OF SAID RENTAL WOULD BE UNJUST AND UNREASONABLE AND WOULD UNDULY PREFER THE OIL WORKS AS A SHIPPER OF ITS COMMODITIES TRANSPORTED BY IT IN THE TANK CARS HERE INVOLVED" IS FULLY SUPPORTED BY EVIDENCE.

The uncontradicted evidence of record shows that the El Dorado Company's only cost in the use of the leased cars, for which it could lawfully be compensated, was its car rental. The evidence also showed, and again without dispute, that the car mileage earnings were greatly in excess of the car rental. Upon these facts it was clear that the El Dorado Company would reap "substantial profits" if it should receive the excess of the car mileage over the car rental. Such "profits," in the view of the Commission, would be rebates and concessions, and would

unduly prefer the El Dorado Company as a shipper of its commodities, in violation of the Elkins Act and other provisions of law. The Commission had previously condemned such payments to shippers, in excess of their car rental and other costs, by its decision in

Use of Privately Owned Refrigerator Cars, 201 I.C.C. 323 (1934).

It is not an answer, as the El Dorado Company contends upon brief (p. 16), that the carriers received their full freight charges under the applicable freight tariffs. The point is that the receipt by the El Dorado Company of the excess of the car mileage over the car rental and other actual expenses, if any, which the carriers are permitted to bear, would operate automatically to reduce the tariff rate. It is this excess car mileage which constitutes the "substantial profit" which the Commission condemned in *Use of Privately Owned Refrigerator Cars, supra*, as a rebate or concession and an unjust discrimination. As the Commission said on page 381 of its report in that case:

> "It cannot be denied that the net cost of the transportation to users of leased and rented cars is reduced by the amounts received in excess of the costs to them and that they are thereby removed from that absolute level of equality with other shippers which the statute was enacted to establish and that the purpose of the legislation is defeated."

The El Dorado Company claims to be entitled to reap this profit out of the use of the privately owned cars, but it is for the Commission to determine whether the shipper may enjoy such profit without violation of law. We need not debate the merits of the issue. It is enough that the

Commission has determined, upon evidence which admitted of no different determination, that the prohibitions of the law against rebates and concessions and preference and discrimination would be set at naught if shippers favored by particularly advantageous car-leasing agreements were permitted to enjoy the substantial profits represented by the excess of car mileage earnings over car rental and other expenses.*

It is not material that the freight charges may have been paid by the consignees (Appellants' Brief, p. 16). The Commission properly disposed of that contention in its report (R. 244-245).

Northern Central Ry. Co. v. United States, 241 Fed. 25 (1917);

Elgin, J. & E. Ry. Co. v. United States, 253 Fed. 907, 911 (1918);

Ohio Tank Car Co. v. Keith Railway Equipment Company, 148 Fed. (2d) 4 (1945).†

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*The annual reports of the Commission over the years clearly disclose its continuing concern with the problem of private cars and its determination to eliminate concessions and discriminations resulting from their use. In its annual report for 1893 the Commission dealt at length with "*Payment of Car Mileage for Use of Private Cars*" (pp. 60 et seq.) and referred to the "many discriminations" resulting from the practice (p. 66). In its annual report for the year 1903 the Commission again emphasized the "*Evils Resulting from the Use of Private Cars*" (p. 22 et seq.). Speaking particularly with respect to the use of stock cars, the Commission said, *inter alia:* "it is charged to have been the practice of the concerns owning such cars to divide with the shippers the mileage received from the railroad companies, *a practice which operated to the same effect as the payment of rebates to such shippers* * * *." (p. 24)

See also Third Annual Report for 1889, pp. 18, 108; Seventh Annual Report for 1893, pp. 60-67; Seventeenth Annual Report for 1903, pp. 22-26; Nineteenth Annual Report for 1905, pp. 10, 11; Twentieth Annual Report for 1906, p. 48; Fifty-fourth Annual Report for 1940, p. 74.

†Certiorari denied by this Court October 8, 1945.

The Commission's determination is within its administrative authority, as expressly declared by this Court, and, being supported by substantial evidence, is conclusive.

It is worthy of note that the conclusion so reached by the Commission is in strict accord with the current of authority evidenced by decisions in other cases of cognate character.

Interstate Commerce Commission v. Reichmann, 145 Fed. 235 (1906).*

Spencer Kellogg & Sons, Inc. v. United States, 20 Fed. (2d) 459 (1927);

Ohio Tank Car Co. v. Keith Railway Equipment Company, 148 Fed. (2d) 4 (1945).†

We are familiar with no ruling of Court or Commission of contrary import.

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*Cited with approval in a foot-note to the opinion of this Court in *Union Pacific Railroad Company, et al. v. United States*, 313 U.S. 450, 463 (1941).

†Certiorari denied by this Court October 8, 1945.

III.

AN ADMINISTRATIVE ORDER OF THE COMMISSION IS SUBJECT TO JUDICIAL REVIEW TO THE EXTENT ONLY OF DETERMINING WHETHER THE ORDER IS WITHIN THE SCOPE OF THE COMMISSION'S AUTHORITY AND THE BASIC PREREQUISITES OF PROOF HAVE BEEN SATISFIED.

The Court is not an appellate administrative tribunal. The scope of review permitted to the Court is definitely limited. As this Court said in

United States v. New River Company, 265 U.S. 533, 542 (1924):

> "The courts will not review determinations of the Commission made within the scope of its powers, or substitute their judgment for its findings and conclusions."

In the more recent case of

Rochester Telephone Corporation v. United States, 307 U.S. 125, 139-140 (1939),

it was held:

> "Even when resort to courts can be had to review a Commission's order, the range of issues open to review is narrow. Only questions affecting constitutional power, statutory authority and the basic prerequisites of proof can be raised. If these legal tests are satisfied, the Commission's order becomes incontestable."

There are many other decisions to the same effect but it will be unnecessary to cite them. Beyond question the Commission has acted within the scope of its constitutional and statutory power. This Court has ruled that this issue is administrative in character and that it is within the

competence of the Commission. Certainly also the basic prerequisites of proof have been satisfied. The order is therefore incontestable and a reviewing court will not substitute its judgment for the judgment of the Commission.

CONCLUSION

We have stated that, in the view of this appellee, the only issue presented upon this appeal is the issue of jurisdiction. If the review may be extended to comprehend the merits, it is clear that

(1) The Commission has determined the administrative question formulated by this Court and raised in the petition filed with the Commission by the El Dorado Company;

(2) The Commission's determination is "within the competence of the Commission," as declared by this Court;

(3) A full and adequate hearing was afforded;

(4) The Commission's findings and conclusions have full record support;

(5) The Commission's determination of the administrative question is final and conclusive.

The final decree of the District Court should be affirmed.

Respectfully submitted,

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Dated at San Francisco, California,
January 23, 1946.

(APPENDIX FOLLOWS)

APPENDIX

STATUTORY PROVISIONS INVOLVED

Elkins Act, Sec. 1, pars. 1 and 2:

"That * * * it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said Act to regulate commerce and the Acts amendatory thereof whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said Act to regulate commerce and the Acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall knowingly, offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars; *Provided*, That any person, or any officer or director of any corporation subject to the provisions of this Act, or the Act to regulate commerce and the Acts amendatory thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by any such corporation, who shall be convicted as aforesaid, shall, in addition to the fine herein provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court. * * *"

"In construing and enforcing the provisions of this section, the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier, or shipper, acting within the scope of his employment, shall in every case be also deemed to be the act, omission, or failure of such carrier or shipper as well as that of the person. Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the Act to regulate commerce or Acts amendatory thereof, or participates in any rates so filed or published, that rate as against such carrier, its officers or agents, in any prosecution begun under this Act shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section of this Act." Act of Feb. 19, 1903, 32 Stat. 847, c. 708, as amended by Act of June 29, 1906, 34 Stat. 587, c. 3591; 49 U.S.C., Sec. 41(1) and (2).

Interstate Commerce Act, Sec. 15(13):

"If the owner of property transported under this part directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like

manner as the orders above provided for under this section." Act of June 29, 1906, 34 Stat. 590, c. 3591, as amended by Act of June 18, 1910, 36 Stat. 553, c. 309, and by Act of Feb. 28, 1920, 41 Stat. 488, c. 91; 49 U.S.C., Sec. 15(13).